

FILED  
Court of Appeals  
Division II  
State of Washington  
7/25/2022 2:39 PM

No. 56482-3-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION – II

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STATE OF WASHINGTON,

Respondent,

v.

FRED HENRY CARPENTER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable John C. Skinder, Judge  
Cause No. 12-1-00773-3

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The trial court's imposition of an exceptional sentence at a resentencing hearing based on State v. Blake, 197 Wash.2d 170, 481 P.3d 521 (2021) was not excessive.

B. STATEMENT OF THE CASE

On June 9, 2012, law enforcement was called to a domestic disturbance call in Thurston County, Washington. CP 1. Upon arrival at the home, deputies entered the home based both on hearing yelling coming from inside the home and the nature of the call. CP 1. When law enforcement entered the home, the Petitioner, Fred Carpenter, pushed past the officers as if they were not there, and fled the scene. CP 1. Once the Petitioner was located by law enforcement, he was uncooperative, resulting in a Taser being deployed and officers taking the Petitioner down by force. CP 1.

After the Petitioner was taken into custody, officers spoke with the victims in this case, Kerrie Dolinski and Amanda Sreap. CP 1. Sreap and the Petitioner were in a relationship, and during

an argument that occurred that evening, the Petitioner grabbed Sreap by the throat several times, squeezing her throat while pushing her against the wall, onto the floor and over the footboard onto the bed. CP 1. Dolinski attempted to step in and stop the altercation, at which time the Petitioner yelled at her, stating that he would kill them both; this made both victims very afraid. CP 1. Law enforcement noted that Sreap stated her throat hurt, her voice was raspy and that she stopped breathing several times during this incident. CP 1-2. There were minor children present when this incident occurred. CP 3-6.

On June 13, 2012, the State filed an Information charging the Petitioner with two counts of Assault in the Second Degree while in the Presence of a Child Domestic Violence, two counts of Felony Harassment while in the Presence of a Child Domestic Violence, and one count each of Assault in the Fourth Degree Domestic Violence and Obstruction of Law Enforcement. CP 3-4.

The case was tried in front of a jury from August 20-22, 2012, and the Petitioner was found guilty on all six counts. Verdict Forms, Supp. CP 37-38, 41-42, 45-46, 49, 53, 55. The jury also found that both counts of Assault in the Second Degree and both counts of Felony Harassment were “aggravated domestic violence offenses.” Special Verdict Forms, Supp. CP 39-40, 43-44, 47-48, 51-52, 54. The Petitioner was sentenced to 104 months on counts one and two, 60 months on counts three and four, and 364 days on counts five and six. CP 13-23. On counts one and two, the Petitioner was sentenced with a score of ten, and a range of 63-84 months. CP 15. The court then imposed an exceptional sentence on counts one and two, based on the aggravating factors found by the jury. CP 15. The total sentence was 104 months confinement and reduced the community custody to 16 months for a total of 120 months, the statutory maximum for counts one and two. CP 15, 18. The Petitioner was sentenced to the maximum allowed on the remaining counts. CP 15, 18.

Carpenter was resentenced after the Court of Appeals dismissed count two, Assault in the Second Degree, on Double Jeopardy grounds, at which time the court reimposed the same sentence. CP 7-12, CP 13-23. The Court's ruling in State v. Blake<sup>1</sup> in February 2021 required Petitioner to be resentenced without the inclusion of certain criminal history, reducing his offender score and standard range. CP 48-59. The court reduced the Petitioner's offender score to 7 on the controlling count, with a new range of 43-57 months. CP 43-51. The court also reimposed the same 20 months exceptional sentence, resulting in a total time of confinement of 77 months. CP 51. The court also imposed a term of 18 months of community custody. CP 51. The Petitioner now argues that the reimposition of the same exceptional sentence despite the reduction in the standard range is excessive. Brief of Appellant at 1, 5.

### C. ARGUMENT

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<sup>1</sup> State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021).



1. The trial court did not impose an excessive sentence when the Petitioner was resentenced with a lower offender score and the same exceptional sentence.

The Petitioner argues that the terms of resentencing after State v. Blake, is clearly excessive because the reduction in offender score should entitle the Petitioner to a proportionate reduction of the exceptional term as compared to the standard range. Brief of Appellant at 6. However, there is no evidence that the law requires a proportionate reduction in sentence when the offender score and standard range changes.

“The trial court has ‘all but unbridled discretion’ in fashioning the structure and length of an exceptional sentence.” State v. France, 176 Wn. App. 463, 470, 308 P.3d 812 (2013) (internal quotation marks omitted) (quoting State v. Halsey, 140 Wn. App. 313, 325, 165 P.3d 409 (2007)). “To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) either that the reasons supplied by the sentencing court are not supported by the record which

was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.” RCW 9.94A.585(4).

“A ‘clearly excessive’ sentence is one that is clearly unreasonable, ‘i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken.’” State v. Kolesnik, 146 Wn. App. 790, 805, 192 P.3d 937 (2008) (quoting State v. Ritchie, 126 Wn.2d 388, 393, 894 P.2d 1038 (1995)). When based on proper reasons, a sentence is excessive only “if its length, in light of the record, ‘shocks the conscience.’” Kolesnik, at 805 (quoting State v. Vaughn, 83 Wn. App. 2d 669, 681, 924 P.2d 27 (1996)). A sentence that shocks the conscience is one that “no reasonable person would adopt.” State v. Halsey, 140 Wn. App. 2d 313, 324–25, 165 P.3d 409 (2007).

In Kolesnik, the Court concluded that the trial court did not err when it sentenced a defendant to an exceptional sentence

twice the standard range when he knowingly and violently assaulted a police officer and that injury resulted in permanent injury. Kolesnik at 806.

In Martinez-Martinez<sup>2</sup>, the Court did not find that an exceptional sentence should be reduced proportionate to the standard range after reducing an offender score in a Blake resentencing case. Martinez-Martinez, No. 54512-8-II, 2022 WL 102614, at \*8 (Div. II Jan. 11, 2022) *review denied* No. 100640-3, 510 P.3d 1001 (2022), The Court ultimately held that Martinez-Martinez was not entitled to resentencing even though the standard range was shortened by 13 months because the court provided an extensive explanation for why it found the jury's finding of the particularly aggravating factor a substantial and compelling reason to impose an exceptional sentence upward. *Id.*

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<sup>2</sup> Under GR 14.1, unpublished opinions have no precedential value, are not binding on any Court, and may be cited only for such persuasive value as the Court deems appropriate.

Neither case law nor the Washington Sentencing Reform Act (SRA) indicates that a sentence must be reduced after the offender score is reduced. State v. Barberio, 66 Wn. App. 902, 907, 833 P.2d 459 (1992), *affirmed by* 121 Wn.2d 48, 846 P.2d 519, (1993). In Barberio, the Court considered whether a reduction in an appellant's offender score and standard range requires a proportionate reduction in the length of the reimposed exceptional sentence as a matter of law. *Id.* The Court held that once a court appropriately determines to impose an exceptional sentence, it has considerable discretion in determining the length of the sentence. *Id.* at 908. "An Appellate Court will not find an abuse of discretion simply because a trial court, after consideration of valid aggravating factors, reimposes the same sentence after a change in an offender score." *Id.* See State v. Moore, No. 42286-7-II., 2013 WL 4105179 (Div II Aug. 13, 2013) (unpublished) (imposing the same 378-month sentence after a reduced offender score).

During the resentencing hearing held on November 4, 2021, the trial court heard argument from both parties. Defense counsel asked for a sentence of either 57 months with no community custody imposed, or in the alternative, 70.5 months with no community custody imposed, arguing that the 70.5 month sentence would be proportional to the original exceptional sentence and the change in offender score. RP 34-35. Defense counsel made this request, arguing that the Petitioner's range changes, and the fact that Petitioner had already served about 88 months in custody. RP 35. The State requested that the Petitioner be resentenced to 57 months, the high-end of the new range, with an exceptional sentence of 20 months and 18 months community custody. RP 43-44.

During the resentencing, the court questioned defense counsel on their position, stating, "The jury made a finding. They found aggravating factors ... it would be very unusual that the court would ignore a jury's special finding of an aggravating factor." RP 38-39. During its ruling, that court stated:

These offenses were very serious ... and when I go through the scoring sheets for how our legislature determined that the court should sentence someone and looking back at what was done in your case, to me the State's position does logically make more sense ... I do think it makes sense that that jury's finding be captured in the same way that the sentencing court handled the matter, and from my perspective that is going to the high end of the range, so the 57 months, and I'm going to add and increase it to 77 months ... There will be an 18-month period of community custody, and I'm not ordering an exceptional sentence to reduce the community custody range ... I'm exercising my discretion. I'm not imposing an exceptional downward. RP 47-49, 51.

The sentence that was imposed at resentencing does not meet the grounds for reversal under RCW 9.94A.585(4) as (a) the sentencing court clearly spelled out in the record the reasons to justify the exceptional sentence imposed, and (b) the sentence was not clearly excessive.

The Court in Kolesnik found that a sentence twice the standard range was not in error given the facts of the case. Kolesnik at 806. Here, the court sentenced the Petitioner to 77 months, 20 months over the standard range, yet 43 months under

the statutory maximum of 120 months. This sentence does not shock the conscience and is not unreasonable.

This case is most like Martinez-Martinez, as the trial court in this case reduced the Petitioner's offender score and range and reimposed the same exceptional sentence after providing an extensive explanation on the record regarding the jury's finding of the aggravating factor. The court used its discretion in reimposing the same sentence and did not abuse that discretion in this case. The sentence should be affirmed as it is not excessive nor disproportionately harsh considering the facts.

#### D. CONCLUSION

Based on the jury's findings of an aggravated factor, the sentencing court used its discretion to impose an exceptional sentence far below the statutory maximum and as such, the sentence is not excessive and should be affirmed.

I certify that this document contains 1876 words, not including those portions exempted from the word count, as

counted by word processing software, in compliance with RAP  
18.17.

Respectfully submitted this 25th day of July, 2022.



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Tabbatha S. Denning, WSBA# 48142  
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## **DECLARATION OF SERVICE**

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: July 25, 2022.

Signature: Stephanie Johnson

# THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

July 25, 2022 - 2:39 PM

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**Appellate Court Case Title:** State of Washington, Respondent v Fred Henery Carpenter, IV, Appellant  
**Superior Court Case Number:** 12-1-00773-3

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